

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD WILLARD HUGHES,

Defendant-Appellant.

UNPUBLISHED

May 20, 2014

No. 314764

Wayne Circuit Court

LC No. 12-007067-01-FH

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b) (sexual penetration by force or coercion), assault with intent to commit CSC involving penetration, MCL 750.520g(1), and assault and battery, MCL 750.81. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent terms of 8 to 30 years' imprisonment for the third-degree CSC conviction, 8 to 20 years' imprisonment for the assault with intent to commit CSC involving penetration conviction, and 35 days in jail (time served) for the assault and battery conviction. We affirm.

Defendant first argues that his rights to a fair trial and due process of law were violated by various improper arguments made by the prosecutor in her closing argument. We disagree. "Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial." *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Unpreserved issues of prosecutorial misconduct are reviewed for "plain error that affected [defendant's] substantial rights." *Id.* at 454. "We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." *Id.* (internal citations omitted).

"The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Prosecutors are generally provided "great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). Prosecutors are permitted to argue the evidence and all reasonable inferences that may be drawn from the evidence relating to the theory of their case. *Id.* Although "[a] prosecutor may not vouch for the credibility of a witness, nor suggest that the

government has some special knowledge that the witness is testifying truthfully,” a prosecutor may “argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief.” *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Finally, “[a] prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.” *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

Defendant first argues that the prosecutor improperly argued the following during the closing argument:

You might also be saying, because of some of the things that have been flung around here, that this prosecutor just wants to have a prosecution for no reason, and I can assure you that I have no shortage of cases where I have to go crumping [sic] something up. . . . Where something has to be fabricated against this defendant in order for us to have something to do.

* * *

Did you hear any evidence that there is a shortage of crime or something has to be made up on [defendant] in order for me to have something to do?

Affording this preserved issue de novo review, we find that this argument was proper in light of the evidence admitted at trial. See *Dobek*, 274 Mich App at 64. The prosecutor was merely commenting on testimony that had been given by both the victim and the victim’s mother, which indicated that the prosecutor sought to proceed with a frivolous case against defendant given that the victim recanted her previous testimony at trial. When read in context, the prosecutor was not vouching for any particular witness or improperly appealing to a juror’s civic duty. Rather, the prosecutor was arguing that, despite what the testimony indicated, it did not proceed with a frivolous case.

Second, defendant argues that the prosecutor improperly vouched for the credibility of the victim by stating:

I want you to think about what [the victim] said when I was going back over her testimony with her from the preliminary exam. By the way, when she was asked, “Look at these jurors and tell them that you lied about it,” she couldn’t even look at you. She couldn’t even keep her eyes on you. And when she got to the point where I’m going over her testimony with her, she shriveled in the chair, turned sideways and put her arm up.

Defendant has failed to show that this unpreserved claim of prosecutorial misconduct constituted plain error affecting his substantial rights. *Thomas*, 260 Mich App at 453. The prosecutor did not suggest that she had special knowledge that the victim was not credible. Rather, the prosecutor commented on the victim’s demeanor during her testimony and permissibly asked the jury to draw an inference based on her demeanor. See *Howard*, 226 Mich App at 548.

Lastly, defendant argues that the prosecutor improperly argued that defendant was successful in getting the victim to recant her previous testimony by stating:

Now, ladies and gentlemen, don't let this defendant get away with his behavior just because he was successful, he and [the victim's mother] in getting this young woman to recant.

Defendant has also failed to show that this unpreserved claim of prosecutorial misconduct constituted plain error affecting his substantial rights. *Thomas*, 260 Mich App at 453. The prosecutor was referring to the victim's preliminary examination testimony, which she recanted at trial. This previous testimony was used at trial to impeach the victim, and the prosecutor properly drew an inference from the evidence that the victim recanted. See *Howard*, 226 Mich App at 548.

Because we found no instances of prosecutorial misconduct, we reject defendant's argument that reversal is warranted based on cumulative error. See *Dobeck*, 274 Mich App at 107. Accordingly, defendant was not denied a fair trial based on prosecutorial misconduct.

Next, defendant argues that the trial court abused its discretion by admitting, as an excited utterance, a statement made by the victim. We disagree. We review a preserved evidentiary claim for an abuse of discretion. *People v Danto*, 294 Mich App 596, 598-599; 822 NW2d 600 (2011). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id.*

MRE 803(2), which provides an exception to the hearsay rule, permits the admission of a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "A statement is admissible under this exception if (1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event." *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). We grant "wide discretion" to the trial court when determining whether the declarant's statement was made while still under the stress of a particular event. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998).

It is clear that a sexual assault is a startling event. *Smith*, 456 Mich at 552. At issue is whether the victim was still under the stress of the assault when she made the statement to the police officer. Defendant contends that the passage of time between the incident and the victim's statement to the officer, and the fact that the victim spoke to at least one person before speaking to the police officer, is determinative for this Court to hold that the hearsay evidence was inadmissible. We disagree. While the time between the event and the statement is a factor to be considered, the focus must remain on whether "the declarant is so overwhelmed that she lacks the capacity to fabricate." *People v McLaughlin*, 258 Mich App 635, 660; 672 NW2d 860 (2003). See also *Smith*, 456 Mich at 552-554 (upholding hearsay evidence admitted under the excited utterance exception when the declarant's statement was given 10 hours after an assault); *Layher*, 238 Mich App at 583-584 (upholding hearsay evidence admitted under the excited utterance exception when a statement was given one week following a sexual assault).

Here, despite the fact that the police officer arrived at the victim's home approximately one hour after the incident occurred, the officer testified that the victim was "shaking, trembling, crying." Although the victim spoke to her friend before she spoke to the officer, the friend also testified that the victim was "crying and yelling at the same time" when the two spoke

immediately after the incident occurred. The fact that the victim was not able to calm down between her phone call with her friend and her statement to the officer, indicates that the victim was still under the stress of the incident and did not have the “reflective capacity essential for fabrication.” *Smith*, 456 Mich at 550. Thus, the trial court did not abuse its discretion by admitting the officer’s testimony regarding the victim’s statement as an excited utterance.

Lastly, defendant argues that the trial court erred by assessing a score of ten points for OV 4 because there was insufficient evidence to show that the victim suffered from a psychological injury. We disagree. “Under the sentencing guidelines, the circuit court’s factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

Pursuant to MCL 777.34(1)(a), OV 4 is assessed a score of ten points when “Serious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(2) further instructs: “Score 10 points if the serious psychological injury may require professional treatment. In making this determination the fact that treatment has not been sought is not conclusive.” This Court has held that a “victim’s statements about feeling angry, hurt, violated, and frightened” support a score of ten points under OV 4. *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

We conclude that there was a preponderance of evidence in the record to justify a score of ten points for OV 4. Contrary to defendant’s argument, the statute is clear that the victim does not have to seek treatment. The responding police officer testified that the victim was visibly upset and shaken after the incident, and the sexual assault nurse examiner testified that the victim sustained injuries consistent with the victim’s account of a sexual assault. Despite evidence that a sexual assault occurred, the record indicates that the victim had undergone serious pressure from her family to recant her testimony at trial. Further, the victim indicated that she was “tired of living with all of this” and that the case has “caused a lot of problems” for her. The trial court evaluated all of these factors in determining that the victim was pressured to change her testimony, and that the injuries inflicted on her by defendant, her stepfather with whom she had a close, familial relationship, resulted in a psychological injury. See *Waclawski*, 286 Mich App at 683 (upholding a score of ten points for OV 4 where the defendant had been a friend and father figure to the victim and exploited that relationship to sexually abuse the victim). Thus, the trial court did not err by scoring OV 4 at ten points, and defendant is not entitled to resentencing.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly